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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1419

JOHN C. DANFORTH,
Attorney General of the State of Missouri,
Appellant,

vs.

PLANNED PARENTHOOD OF CENTRAL MISSOURI, a Missouri Corporation, DAVID HALL, M.D., MICHAEL FREIMAN, M.D., and J. BRENDAN RYAN, Circuit Attorney of the City of St. Louis,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION

JURISDICTIONAL STATEMENT

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PLANNED PARENTHOOD OF CENTRAL MISSOURI, a Missouri Corporation, DAVID HALL, M.D., MICHAEL FREIMAN, M.D., and J. BRENDAN RYAN, Circuit Attorney of the City of St. Louis,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION

JURISDICTIONAL STATEMENT

Appellant John C. Danforth, Attorney General of the State of Missouri, brings this direct appeal from that part the "Order, Judgment and Decree" entered by the United States District Court for the Eastern District of Missouri (William H. Webster, Circuit Judge; Roy W. Harper and H. Kenneth Wanglin, District Judges), which declares unconstitutional Section 6(1) of House Committee Substitute for House Bill No. 1211, 77th General Assembly of Missouri, Second Regular Session, and from the order entered February 12, 1975, by said three-judge court denying appellant's "Motion to Alter or Amend Judgment" in regard to Section 6(1).

CITATION TO OPINION BELOW

The "Memorandum Opinion," the "Order, Judgment and Decree" entered pursuant thereto, and the order of February 12, 1975, denying appellant's "Motion to Alter or Amend Judgment" entered in Cause Number 74-416C(A) have not yet been reported. The complete text of the opinion and orders referred to above is set out in the Appendix at pages A-1 through A-40.

JURISDICTION

In accordance with Supreme Court Rule 15(1b), the jurisdiction of this Court is grounded upon the following:

(i) On June 17, 1974, Appellees Planned Parenthood of Central Missouri, a Missouri Corporation, David Hall, M.D., and Michael Freiman, M.D.,[1] filed a "Verified Complaint for Declaratory Judgment and Injunctive Relief," alleging federal jurisdiction pursuant to 28 U.S.C. Sections 1331, 1343, 2201, 2202, 2281 and 2284, and 42 U.S.C. Section 1983. Appellees challenged the constitutionality of House Committee Substitute for House Bill No. 1211, passed by the Missouri General Assembly on April 30, 1974, and signed into law by the Governor of the State of Missouri on June 14, 1974. In addition to a declaration of unconstitutionality, appellees prayed that appellant and the Circuit Attorney of the City of St. Louis be enjoined from enforcing the chal-

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[1] Throughout this Jurisdictional Statement, these appellees, plaintiffs below, will be referred to as "appellees." Pursuant to Supreme Court Rule 10, J. Brendan Ryan, Circuit Attorney of the City of St. Louis, a defendant below, has been designated an appellee in the style but is not included in any reference to appellees herein.

lenged provisions of House Bill No. 1211. A statutory three-judge court was convened on June 19, 1974, pursuant to 28 U.S.C. Sections 2281 and 2284. Trial of this cause was conducted on July 22 and 23, 1974.

(ii) On January 31, 1975, an opinion and order were entered upholding all the challenged sections of said legislation with the sole exception of Section 6(1), which was held to be unconstitutional and its enforcement accordingly enjoined. Appellant filed a "Motion to Alter or Amend Judgment" on February 6, 1975, requesting that the court change its order to conform with its Opinion, thereby declaring unconstitutional only the first sentence of Section 6(1) rather than the entire section. This motion was denied by the three-judge court on February 12, 1975. Appellant filed his Notice of Appeal in the United States District Court for the Eastern District of Missouri, Eastern Division, on March 14, 1975.

(iii) Jurisdiction of this Court is predicated upon 28 U.S.C. Section 1253, which authorizes a direct appeal of the order of a three-judge court declaring a state statute unconstitutional and enjoining enforcement thereof.

(iv) Cases which sustain the jurisdiction of this Court are: *Roe, et al.*, v. *Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); and *Gonzalez, et al.*, v. *Automatic Employees Credit Union, et al.*, —— U.S. ——, 95 S.Ct. ——, 42 L.Ed.2d 249 (1974).

(v) The complete text of Section 6(1) of House Committee Substitute for House Bill No. 1211 is as follows:

> "No person who performs or induces an abortion shall fail to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus

intended to be born and not aborted. Any physician or person assisting in the abortion who shall fail to take such measures to encourage or to sustain the life of the child, and the death of the child results, shall be deemed guilty of manslaughter and upon conviction shall be punished as provided in Section 559.140, RSMo. Further, such physician or other person shall be liable in an action for damages as provided in Section 537.080, RSMo."

QUESTIONS PRESENTED

I. Whether the Court below should have abstained from deciding the constitutionality of Section 6(1), House Bill No. 1211, because the meaning of the first sentence of Section 6(1) is subject to two conflicting interpretations, one of which would avoid or modify the necessity of reaching the constitutional problem raised by plaintiffs?

II. Whether the first sentence of Section 6(1), House Bill 1211, is unconstitutionally overbroad?

III. Assuming *arguendo* that the first sentence of Section 6(1) is unconstitutionally overbroad, is it severable from the remainder of Section 6(1)?

STATEMENT OF THE CASE

House Committee Substitute for House Bill No. 1211 was passed by the General Assembly of the State of Missouri on April 30, 1974, and was signed into law by the Honorable Christopher S. Bond, Governor of the State of Missouri, on June 14, 1974. An emergency clause was appended to this bill, and therefore, it became effective immediately upon approval by the Governor.

On June 17, 1974, Appellees Planned Parenthood of Central Missouri, Inc., Hall and Freiman filed suit in the United States District Court for the Eastern District of Missouri challenging the constitutionality of this statute and seeking an injunction against its enforcement. A statutory three-judge court was convened on June 19, 1974, pursuant to 28 U.S.C. Sections 2281 and 2284. Judgment was rendered on January 31, 1975, after a two-day hearing which was held on July 22 and 23, 1974. The court held that Sections 2(2), 3(2), 3(3), 3(4), 7, 9, 10, and 11 of House Bill No. 1211 were constitutional[2] and declared that Section 6(1) was unconstitutional and issued a permanent injunction against the enforcement of that section.

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[2] Appellees have appealed this part of the three-judge court's judgment to this Court. See *Planned Parenthood of Central Missouri, et al.*, v. *Danforth, et al.*, No. 74-1151 (October Term, 1974).

THE QUESTIONS ARE SUBSTANTIAL

The three-judge court below determined that most of the challenged sections of House Bill No. 1211 were constitutional. As previously noted, appellees have appealed to this Court that aspect of the three-judge court's decision. See *Planned Parenthood of Central Missouri, et al.*, v. *Danforth et al.*, No. 74-1151, October Term, 1974.

The questions on this appeal relate to the one section of House Bill No. 1211 found by the three-judge court to be unconstitutional—Section 6(1). Basically, the problem with regard to Section 6(1) is interpreting the language of the first sentence. Appellant and appellees interpreted the first sentence differently. Under appellant's interpretation, no constitutional problem would exist. Therefore, appellant urged the three-judge court to refer appellees to the Missouri state courts for an interpretation of this part of a statute which had never been applied before. The lower court, however, interpreted the language of the first sentence and declared the entire provision unconstitutional. By doing so, a federal court has maximized, not minimized, federal-state friction and rendered a possibly unnecessary constitutional adjudication contrary to this Court's direction in *Kusper* v. *Pontikes*, 414 U.S. 51, 54, 94 S.Ct. 303, 38 L.Ed.2d 260, 265 (1973).

Furthermore, having taken upon itself the unnecessary task of interpreting Section 6(1), the court below adopted an erroneous interpretation of the words of the first sentence and thereby created a constitutional problem which is resolved by striking down the entire section rather than only the offending sentence. Therefore, not only did the three-judge court below unnecessarily reach a constitutional question, but it declared unconstitutional more of a state statute than was necessary to resolve what it errone-

ously perceived to be a defect. Appellant submits that substantial questions worthy of this Court's review are raised when a federal court unnecessarily strikes down a state statute or any part thereof.

Interpreting Section 6(1) involves the question of whether the first sentence should be read with the second and third sentences or whether the first sentence pertains to circumstances distinct from those to which the other sentences apply. Section 6(1) reads as follows:

> "No person who performs or induces an abortion shall fail to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted. Any physician or person assisting in the abortion who shall fail to take such measures to encourage or to sustain the life of the child, and the death of the child results, shall be deemed guilty of manslaughter and upon conviction shall be punished as provided in Section 559.140, RSMo. Further, such physician or other person shall be liable in an action for damages as provided in Section 537.080, RSMo."

Appellees, apparently focusing or the first sentence of Section 6(1), argued below that Section 6(1) requires that physicians in performing an abortion must exercise the same care and diligence as would be required during a delivery in which the fetus was intended to be born alive. (Appellees' Post-Trial Brief, p. 15.) Appellees' witnesses testified that it was medically impossible to exercise the same skill and diligence to preserve the life of a fetus during an abortion as would be exercised if the fetus were intended to be born alive. (Warren, T. 29, Kerenyi, T. 91.) Therefore, appellees argued below that Section 6(1), as

interpreted by them, had a "chilling effect" on the performance of abortions in Missouri. (Appellees' Post-Trial Brief, p. 15.)

Appellant below argued that, properly interpreted, the first sentence of Section 6(1) establishes a general standard of care applicable only if a live-born fetus results from an abortion. In the event and only in the event that a live-born fetus results, the physician must exercise the degree of professional skill, care and diligence to preserve the life of this living person as would have been used if it were intended that the fetus be born alive. In other words, the fact that a live-born fetus results from the performance of an abortion should not permit it to be treated differently than if it had been intended to be born alive. The second sentence of Section 6(1) provides that if the standard of care required by the first sentence is not followed, i.e. "shall fail to take such measures. . . .", and the live-born fetus dies, the physician or person assisting with the abortion shall be guilty of manslaughter.

Appellant's interpretation of Section 6(1)—that all three sentences in Section 6(1) pertain to a time after the pregnancy has been terminated—is the only interpretation supported by the evidence of legislative intent introduced in the evidentiary hearing held below. Representative O'Toole, the sponsor of House Bill No. 1211 in the Missouri General Assembly, testified that Section 6(1) was intended to preserve fetal health after the abortion was completed. Material had been distributed to various committees and members of the Missouri General Assembly describing things that had been done to fetuses born alive as a result of an abortion ". . . such as dropping a breathing fetus into a bucket of water." T. 180-181. In order to prevent such occurrences in Missouri, the General Assembly provided a standard of care applicable after the abortion has been

completed. To interpret Section 6(1) in conformity with that intent of the Missouri General Assembly does not contravene any right afforded any pregnant woman desiring an abortion.

The woman's pregnancy has been terminated *before* the standard of care provided for in Section 6(1) becomes operable. Whatever standard of care is appropriate for a physician in *performing* an abortion is left unaffected by Section 6(1). However, once the fetus is aborted alive, the physician must then exercise the prescribed standard of care. Certainly, if Missouri may regulate abortion in the interest of maternal health beginning at approximately the end of the first trimester, and if Missouri may proscribe abortion after viability except when abortion is necessary to preserve the life or health of the mother, "it is obvious the state can legislate to protect a live-born infant. . . ." *Planned Parenthood of Central Missouri, et al.*, v. *Danforth, et al.*, —— F. Supp. —— at ——; Appendix, p. A-15.

Even though, as the above quote indicates, the court below recognized the state's legitimate interest in protecting a live-born infant, the court below chose to interpret the first sentence of Section 6(1) as establishing a standard of care applicable prior to completion of an abortion. By erroneously interpreting Section 6(1), the lower court has prevented the State of Missouri from effectuating a legitimate state interest—protecting live-born infants—when to do so would not in any way affect a woman's right to an abortion or a physician's right to practice medicine. A substantial question is thereby raised which should receive full review by this Court.

Even if it is assumed *arguendo* that the first sentence of Section 6(1) is unconstitutionally overbroad, another serious and substantial question is whether the lower court

struck down more of Section 6(1) than was necessary. As appellant argued to the lower court in his "Motion to Alter or Amend Judgment," the three-judge court's Opinion focused on the first sentence of Section 6(1) as the offending portion of the section—"The court, therefore, holds that the first sentence of Section 6(1) is unconstitutionally overbroad for failure to exclude the stage of pregnancy prior to viability." Appendix, p. A-15. Even though the court below believed the first sentence to be the problem, and even though the lower court recognized that the second and third sentences referred to live-born infants which the state could protect, the court declared the *entire* section unconstitutional. No consideration was given by the three-judge court to whether the first sentence was severable from the balance of Section 6(1) even though Section B of House Bill No. 1211 specifically provides that all provisions are severable.[3]

In summary, this appeal raises several substantial questions relating to the propriety of the three-judge court's judgment that Section 6(1) of House Bill No. 1211 was unconstitutional and that its enforcement should be restrained. For the reasons stated herein, this Court should note probable jurisdiction and set this appeal on its docket

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[3] Section B of House Bill No. 1211 provides as follows:

"Section B. If any provision of this Act or the application thereof to any person or circumstance shall be held invalid, such invalidity does not affect the provisions or application of this Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared to be severable."

for plenary review with briefs and oral argument on the merits.

Respectfully submitted,

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IN THE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

PLANNED PARENTHOOD OF CENTRAL MISSOURI, a Missouri corporation, DAVID HALL, M.D., and MICHAEL FREIMAN, M.D., *Plaintiffs,* vs. JOHN C. DANFORTH, Attorney General of the State of Missouri, and J. BRENDAN RYAN, Circuit Attorney of the City of St. Louis, Missouri. *Defendants.*	No. 74-416C (A)

Before WEBSTER, Circuit Judge, WANGELIN and HARPER, District Judges. HARPER, Senior District Judge.

MEMORANDUM OPINION

This is an action by plaintiffs seeking to have declared as unconstitutional certain provisions of House Bill No. 1211 (hereinafter referred to as House Bill 1211), passed by the Missouri General Assembly on April 30, 1974, and signed into law on June 14, 1974, and for an injunction against the enforcement of the challenged provisions of the Bill.

Plaintiffs are Planned Parenthood of Central Missouri (hereinafter referred to as Planned Parenthood), a not-for-profit Missouri corporation which maintains facilities for

the performance of abortions in Columbia, Missouri; David Hall, a resident of the State of Missouri who supervises abortions at the Columbia Planned Parenthood facility as a duly licensed physician; and Michael Freiman, a resident of Missouri who performs abortions as a duly licensed physician at the Barns and Jewish Hospitals in St. Louis, Missouri, and at a St. Louis abortion clinic operated by Reproductive Health Services, Inc. Plaintiffs bring this action on their own behalf and on behalf of the class of physicians desiring to perform pregnancy termination services, and on behalf of the class of their patients who seek abortions. The complaint charges that certain provisions of House Bill 1211 are invalid in that they deprive plaintiffs and their patients of various alleged constitutional rights, including the privacy of the doctor-patient relationship, the physician's right to the free exercise of medical practice, the right of a woman to determine whether to bear children, the right to life of their patients and the right to receive adequate medical treatment, all in violation of the First, Fourth, Fifth, Eighth, Ninth and Fourteenth Amendments to the United States Constitution. The petition further alleges that the legislation is violative of the rights of due process and equal protection guaranteed plaintiffs and their patients under the Constitution, and that it imposes a cruel and unusual punishment upon women by forcing them to bear pregnancies which they conceive.

Jurisdiction of the Court is invoked under 28 USC §§1331, 1343, 2201, 2202, 2281 and 2284, and under 42 USC 1983. Because of the claim for injunctive relief, a three-judge court was convened pursuant to 28 USC 2281.

In their initial application for a temporary restraining order plaintiffs challenged only Sections 2(2), 6(1), 7 and 9. At the hearing for a preliminary injunction plaintiffs

expanded their challenge to include Sections 3(3) and 3(4). During discovery plaintiffs additionally attacked Sections 3(2), 10 and 11. On the day defendants submitted their trial brief, plaintiffs advised defendants of their intention to challenge Sections 5, 6(3) and 8, and the next day Section 4 was included. On the day of trial defendants' motion for continuance as to Sections 4, 5, 6(3) and 8 was granted, and the Court proceeded to trial on the other provisions and set a later date to complete the trial on the late challenged provisions. At the close of the hearing plaintiffs withdrew their challenge to those provisions.

The challenged portions of House Bill 1211 provide as follows:

> "Section 2. Unless the language or context clearly indicates a different meaning is intended, the following words or phrases for the purpose of this act shall be given the meaning ascribed to them:
>
> • • •
>
> "(2) 'Viability', that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems;
>
> • • •
>
> "Section 3. No abortion shall be performed prior to the end of the first twelve weeks of pregnancy except:
>
> • • •
>
> "(2) After the woman, prior to submitting to the abortion, certifies ~~in writing~~ her consent to the abortion and that her consent is informed and freely given and is not the result of coercion.
>
> "(3) With the written consent of the woman's spouse, unless the abortion is certified by a licensed

physician to be necessary in order to preserve the life of the mother.

"(4) With the written consent of one parent or person in loco parentis of the woman if the woman is unmarried and under the age of eighteen years, unless the abortion is certified by a licensed physician as necessary in order to preserve the life of the mother.

• • •

"Section 6. (1) No person who performs or induces an abortion shall fail to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted. Any physician or person assisting in the abortion who shall fail to take such measures to encourage or to sustain the life of the child, and the death of the child results, shall be deemed guilty of manslaughter and upon conviction shall be punished as provided in Section 559.140, RSMo. Further, such physician or other person shall be liable in an action for damages as provided in Section 537.080, RSMo.

• • •

"Section 7. In every case where a live born infant results from an attempted abortion which was not performed to save the life or health of the mother, such infant shall be an abandoned ward of the state under the jurisdiction of the juvenile court wherein the abortion occurred, and the mother and father, if he consented to the abortion, of such infant shall have no parental rights or obligations whatsoever relating to such infant, as if the parental rights had been terminated pursuant to section 211.411(sic), RSMo.

The attending physician shall forthwith notify said juvenile court of the existence of such live born infant.

• • •

"Section 9. The general assembly finds that the method or technique of abortion known as saline amniocentesis whereby the amniotic fluid is withdrawn and a saline or other fluid is inserted into the amniotic sac for the purpose of killing the fetus and artificially inducing labor is deleterious to maternal health and is hereby prohibited after the first twelve weeks of pregnancy.

"Section 10. 1. Every health facility and physician shall be supplied with forms promulgated by the division of health, the purpose and function of which shall be the preservation of maternal health and life by adding to the sum of medical knowledge through the compilation of relevant maternal health and life data and to monitor all abortions performed to assure that they are done only under and in accordance with the provisions of the law.

"2. The forms shall be provided by the state division of health.

"3. All information obtained by physician, hospital, clinic or other health facility from a patient for the purpose of preparing reports to the division of health under this section or reports received by the division of health shall be confidential and shall be used only for statistical purposes. Such records, however, may be inspected and health data acquired by local, state, or national public health officers.

"Section 11. All medical records and other documents required to be kept shall be maintained in the permanent files of the health facility in which the abortion was performed for a period of seven years."

House Bill 1211 concludes with a clause declaring that the provisions of the Act are severable, so that judicial invalidation of any provision shall not affect such remaining provisions as can be given effect in the absence of the invalid provision.

The threshold question for consideration is the justiciability of this litigation. The individual plaintiff-physicians have standing as to each the challenged provisions of House Bill 1211 by reason of the criminal sanctions imposed under that Act. In holding that the Georgia physicians who attacked that state's abortion legislation in *Doe* v. *Bolton*, 410 U. S. 179 (1973), presented a justiciable controversy, the Supreme Court stated at page 188 of their opinion:

> "The physician is the one against whom these criminal statutes directly operate in the event he procures an abortion that does not meet the statutory exceptions and conditions. The physician-appellants, therefore, assert a sufficiently direct threat of personal detriment. They should not be required to await and undergo a criminal prosecution as the sole means of seeking relief. *Crossen* v. *Breckenridge*, 466 F. 2d 833, 839-840 (CA6 1971); *Poe* v. *Menghini*, 339 F. Supp. 986, 990-991 (Kan. 1972)."

Section 6(1) of House Bill 1211 provides that an attending physician who fails to exercise the prescribed standard of care to protect an aborted fetus shall be deemed guilty of manslaughter. In addition, Section 14 provides that any person who performs an abortion in violation of the requirements set forth elsewhere in the Act will be guilty of a misdemeanor. This statute is "recent and not moribund", *Doe* v. *Bolton*, supra, and we may assume that violations thereof will be actively prosecuted.

Due to the obvious standing of the physician-plaintiffs in this case, the Court deems it unnecessary to pass

upon the question of Planned Parenthood's standing to challenge House Bill 1211. See *Doe* v. *Bolton*, supra, page 189.

In January of 1973, the United States Supreme Court in the case of *Roe* v. *Wade*, 410 U. S. 113, declared unconstitutional the Texas criminal abortion statutes which prohibited performance of all abortions except where necessary to save the life of the mother. In doing so, the Court made it clear that its opinion was not intended to prevent the state from limiting or even proscribing abortions under certain circumstances. The Court stated at pages 153-154:

> "[A]ppellant and some amici argue that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses. *With this we do not agree.*
>
> "We • • • conclude that the right of personal privacy includes the abortion decision, but that this right is *not unqualified* and must be considered against *important state interests in regulation.*" (Emphasis added.)

These state interests include the right to protect maternal health, which justifies regulation of abortion procedures after the first twelve weeks of pregnancy, and the interest in protecting potential human life which allows the state to prohibit abortions once the fetus has achieved viability.

The companion case of *Doe* v. *Bolton*, 410 U. S. 179 (1973), emphasized the Court's position with respect to uncontrolled abortion. At page 189 of that opinion the Court reiterated:

> "Roe v. Wade, supra, sets forth our conclusion

that a pregnant woman does not have an absolute constitutional right to an abortion on her demand."

Subsequent to these decisions, Missouri's criminal statute, proscribing abortions where not necessary to save the life of the woman or the unborn child, was declared unconstitutional. Thereafter, the Missouri General Assembly labored through two legislative sessions in order to perfect a bill which would regulate abortion within the parameters established by the Supreme Court. The result is House Bill 1211. This Court has engaged in a careful scrutiny of each of the challenged provisions of this bill and finds that with the exception of Section 6(1) they conform to the *Roe* and *Doe* decisions in very material respect.

Section 2(2): Section 5 of House Bill 1211 prohibits performance of abortions except to preserve the life or health of the mother once the fetus is viable. Plaintiffs do not challenge section 5, rather it is their position that the definition of viability in section 2(2) is invalid because it fails to distinguish between trimesters of pregnancy and because the definition would have the result, when read in conjunction with section 5, of forbidding non-therapeutic abortions at an earlier point than is constitutionally permissible under *Roe* and *Doe*. Defendants maintain that the definition adapted by the Missouri legislature is in substance the same as that employed by the Supreme Court.

In *Roe*, the Court defined the point at which the fetus becomes "viable" as potentially able to live outside the mother's womb, *albeit with artificial aid"*. (Emphasis added). 410 U. S. at page 160. The definition of viability, in House Bill 1211 (Section 2(2)) is essentially the same as that set forth in *Roe*. If anything, the Missouri definition is more restrictive than that suggested in Roe, since it requires that the life of the fetus be capable of being

continued "indefinitely" outside the womb before it is to be considered viable.

Plaintiff Hall stated in that portion of his deposition offered at the trial that viability is a difficult stage to assess, but that he agreed with the definition set forth in Section 2(2) of the statute (Tr. 369).

Plaintiffs suggest that in order to be constitutionally valid, a statutory definition of viability should establish a specific point in gestation when the fetus is to be considered viable. Plaintiffs suggest that the period subsequent to the twenty-fourth week, or approximately the end of the second trimester, would be appropriate. While *Roe* v. *Wade* did refer to the fact that viability is usually reached at twenty-four to twenty-eight weeks, 410 U.S. at page 160, the Supreme Court did not elect to preempt the physician's judgment in making this determination. Whereas the Court set the first "compelling point", or the period after which the state may regulate abortion in ways related to the mother's health, at the end of the first trimester, it established the second "compelling" point, after which the state may protect fetal life, at "viability" rather than a specific period after conception, 410 U.S. at page 163-165.

We do not think it is properly the function of the legislature or the courts to fix viability at an inflexible point in gestation. The time when viability is achieved will vary with each pregnancy, and the determination of whether a fetus is viable in a particular case must be left to the attending physician. Section 2(2) has precisely this effect.

Section 3(2): Section 3(2) requires a woman's informed consent in writing prior to the abortion. The Supreme Court in *Roe* enumerated a few of the many factors which must be weighed by a woman who is considering an abortion. The Court stated, 410 U. S. at page 153:

> "Maternity, or additional offspring, may force upon the woman a distressful life and future; psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician *necessarily will* consider in consultation." (Emphasis added.)

Given the fact that even with counseling the decision of whether to terminate a pregnancy is often a stressful one (Warren Tr. 30, Anderson Tr. 351-352), it is imperative that a woman be well advised of the options available, and the physical and psychological ramifications of choosing a particular course of action.

After discussing the development of judicial recognition of a constitutional right of privacy, the Supreme Court stated in *Roe* v. *Wade,* supra, at page 154, that, "We, therefore, conclude that the right of personal privacy includes the abortion decision."

It is clear from the Court's opinion that although the abortion decision is to be made in consultation with a responsible physician, the ultimate decision is not the physician's to make. The consent requirement of Section 3(2) insures that the pregnant woman retains control over the discretions of her consulting physician.

Furthermore, written consent is a common practice of physicians of surgical procedures. This portion of the statute does not single out the abortion procedure, but

merely includes it within the category of medical operations for which consent is required.

Sections 3(3) and 3(4): Sections 3(3) and 3(4) require either the written consent of the woman's spouse, or if she is single and under eighteen years of age, the consent of a parent or one in loco parentis. In deciding *Roe* and *Doe,* the Supreme Court declined to discuss the rights of the woman's spouse or parents to participate in the abortion decision because neither of the statutes dealt with in those cases contained provisions for spousal or parental consent, 410 U. S. page 165, Footnote 67.

Roe v. *Wade,* held that a woman's limited right to privacy in the area of abortion outweighed the state's interest in protecting her health during the period up to the end of the first trimester of pregnancy when an abortion may be safer than bearing the pregnancy to term, and that this right to privacy also outweighed the state's interest in protecting the life of the fetus prior to the point when that fetus becomes viable. Thus, the only state interests involved in that decision were the protection of maternal health and the protection of the fetus.

Historically the courts have recognized that the marriage entity is one which is subject to the state's control. In approving Utah's ban on polygamy, the Supreme Court in *Reynolds* v. *United States,* 98 U. S. 145 (1878), stated at page 165:

> "Marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal."

In *Maynard* v. *Hill,* 125 U. S. 190 (1888), the Court

reiterated that the marriage entity provides the foundation of our societal structure. At page 205 the Court stated:

> "Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature. That body prescribes the age at which parties may contract to marry, the procedure or form essential to constitute marriage, the duties and obligations it creates, its effects upon the property rights of both, present and prospective, and the acts which may constitute grounds for its dissolution."

More recently the Court has based the right of a state to regulate the status of marriage upon the need to protect the "regularity and integrity of the marriage relation." *Estin* v. *Estin,* 334 U. S. 541, 546 (1948).

Traditional permissible state regulation, therefore, has involved not only laws concerning formulation and dissolution of the relationship but also legislation designed to protect the integrity of the marriage unit. In addition to the polygamy laws discussed in *Reynolds* v. *United States,* supra, typical examples of such legislation include the imposition of punishment for acts such as adultery and bigamy.

Procreation has been held to be a fundamental aspect of the marriage relationship. *Skinner* v. *Oklahoma,* 316 U. S. 535, 541 (1942). Testimony and exhibits introduced at the trial of the instant case establish that there is a direct relationship between induced abortions and the incidence of infertility, premature and still births resulting from subsequent pregnancies (Dr. Backer, Tr. 219, 222-223, Defts' Exs. V, O, S and T). Infants born prematurely are in turn subject to numerous physical and mental defects (Dr. Backer, Tr. 221-222). We are, therefore, not

concerned merely with a husband's interest in seeing that a particular fetus conceived by the partners to the marriage is carried to term. We are also confronted with the fact that the decision of whether or not to abort one pregnancy may have a profound effect on the future reproductive capacity of the marriage.

Other testimony at the trial merely supports what should be obvious—that those things which foster mutuality and trust in a marriage tend to strengthen the relationship and the institution of marriage (Dr. Kenkel, Tr. 235-236). In the area of procreation, which is a fundamental aspect of that relationship, the state's interest in protecting the integrity of the marriage unit and the mutuality of decisions made by the partners to that unit becomes particularly compelling. It is difficult to see how marital harmony could possibly be preserved if husbands were precluded from participating in decisions which affect the very essence of the marriage relationship.

The interest of the state in protecting the mutuality of decisions vital to the marriage relationship is compelling at all times during the marriage. It does not vary in importance at different times during the relationship, and certainly is not subject to distinctions between trimesters of the wife's pregnancy.

In considering the validity of the parental consent requirement it is recognized that the interest in protecting the mutuality of a marriage relationship is not present. Nevertheless, "the state's authority over children's activities is broader than over like actions of adults." *Prince* v. *Massachusetts,* 321 U. S. 158, 168 (1945). In *Ginsberg* v. *New York,* 390 U. S. 629 (1968), the Supreme Court pointed out that the state has a duty to support parents in the discharge of their responsibility for the care of their children. The Court stated at page 639:

> "The well-being of its children is of course within the State's constitutional power to regulate, * * *. [C]onstitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society. * * * [P]arents and others * * * who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility."

In fact, the state may not unduly interfere with that parental responsibility. *Wisconsin* v. *Yoder*, 406 U. S. 205 (1972), l.c. 231-234; *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1924), l.c. 534-35.

The state's interest in safeguarding the authority of the family relationship would appear to this Court to be a compelling basis for allowing regulation of a minor's freedom to consent to an abortion. The requirement of parental consent in section 3(4) of House Bill 1211 does not single out the abortion procedure, since it is the practice of hospitals and physicians to require that a minor's parent consent to other surgical treatment as well.

In discussing the validity of Section 3(2) above, we held that the consent of the woman is an indispensable prerequisite to obtaining an abortion. Yet as person under the age of majority is deemed incapable of giving legal consent. We do not believe that the Supreme Court, in recognizing a woman's limited right to obtain an abortion in *Roe* and *Doe*, intended those decisions to have the effect of emancipating children in that respect. Testimony at the trial of this case disclosed that children as young as ten years old have sought abortions (Widdicombe, Tr. 164). A girl of that age cannot be presumed capable of making a decision as profound as the abortion decision without

proper advice and counsel of her parents or a person in loco parentis.

We do not believe that in weighing the state's interests in protecting maternal health and fetal life, the Supreme Court in *Roe* and *Doe* intended to preclude the consideration of other fundamental state interests. The consent requirements of the Missouri abortion law are justified by such other compelling interests.

Section 6(1): The first sentence of Section 6(1) prescribes the standard of care which a person performing an abortion must exercise for the protection of the fetus, without reference to any particular stage of pregnancy. The second and third sentences of this provision impose criminal and civil liability for failure to "take such measures to encourage or sustain the life of the child", when "the death of the child results" from such failure. While it is obvious that the state can legislate to protect a live born infant, and we have pointed out at the outset of our discussion on the merits that *Roe* would permit the state to legislate on behalf of the fetus after the point of viability is achieved, the difficulty with Section 6(1) is that it imposes a standard of care for protection of the fetus which would apply at any stage of pregnancy.

Defendants argue that the proper construction to be given this section is that it requires attending medical personnel to take positive action only subsequent to an abortion in the event the fetus is aborted alive. Reflection upon the language employed convinces us otherwise. While the second sentence speaks of sustaining the life of the "child", clearly referring to a live born infant, the first sentence directs that a person performing an abortion must protect the life and health of the "fetus". The Court, therefore, holds that the first sentence of Section 6(1) is unconstitutionally overbroad for failure to exclude the stage of pregnancy prior to viability.

Section 7: Section 7 provides that where a live infant results from an attempted abortion which was not performed to save the life or health of the mother, such infant shall be an abandoned ward of the state under the jurisdiction of the Juvenile Court, and the rights of the parents consenting to the abortion shall be terminated. This section also requires the attending physician to forthwith notify the juvenile court of the existence of such live born infant. All of plaintiffs' several arguments that such summary termination is violative of due process must give way to the reality of the circumstances surrounding the occurrence of a live birth during an attempted abortion. The immediate concern must be for the care and protection of the infant. The fate of such a live born infant is surely of as much interest to the state as the interest in potential human life which the state can protect under *Roe*.

In the rare instance in which a live birth would result from an attempted abortion the state would be justified in assuming immediate temporary custody of the unwanted child. It is a simple matter for the juvenile court to insure that parents of such a child be given an adequate opportunity to be heard before parental rights are permanently terminated. Section 7 specifically provides that the parents of a child aborted alive shall have no parental rights as if their "rights had been terminated pursuant to section 211.411" (sic) of the Missouri Revised Statutes. RSMo. 211.441 sets forth the circumstances under which parental rights may be terminated. These circumstances include abandonment of the child, which is exactly the situation Section 7 is designed to protect. Chapter 211 of the Missouri statutes provides for notice, an opportunity for the parents to be heard and present testimony on their behalf, right to counsel and right to a jury trial of the issues. House Bill 1211 thus incorporates by reference statutory due process guarantees which provide adequate protection

to the parents of a live aborted child who might desire to regain custody of such a child.

Nor can this Court find fault of constitutional magnitude with respect to the reporting requirement of Section 7. A report of every birth in Missouri must currently be filed with the state division of health by the physician, midwife, or other person in attendance at the birth. RSMo. 193.100. Section 7 of the challenged legislation simply requires that in certain instances the attending physician must also report the existence of a live birth to the juvenile court. The inclusion of such reporting acts within the state's police power is not questioned. The requirement that a live birth resulting from an attempted abortion be reported to the juvenile authorities in addition to the division of health does not impose an undue burden upon attending physicians.

Section 9: Section 9 prohibits use of the saline amniocentesis method of abortion after the first twelve weeks of pregnancy. Plaintiffs contend that this provision is invalid for the reason that it invades the province of the physician by restricting his exercise of medical judgment in performing abortions.

In summarizing the effect of its decision in *Roe* v. *Wade*, supra, the Supreme Court stated at page 165-166 of that opinion:

> "This holding, we feel, is consistent with the relative weights of the respective interest involved, with the lessons and examples of medical and legal history, with the lenity of the common law, and with the demands of the profound problems of the present day. The decision leaves the State free to place increasing restrictions on abortion as the period of pregnancy lengthens, so long as those restrictions are tailored to the recognized state interests. The decision vindicates

the right of the physician to administer medical treatment according to his professional judgment *up to the points* where important state interests provide compelling justifications for intervention." (Emphasis added.)

The Court specifically held that:

"With respect to the State's important and legitimate interest in the health of the mother, the 'compelling' point, in the light of present medical knowledge, is at approximately the end of the first trimester. • • • [A]fter this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health." Id, at page 163.

Thus the judgment of the physician is only unfettered during the first twelve weeks of pregnancy. State regulation of the abortion procedure is not an invalid infringement upon the medical judgment of the physician after the first trimester unless the regulation is not reasonably related to maternal health. Section 9 seeks only to proscribe the saline method during the period subsequent to the first trimester. The only question remaining is whether prohibition of this particular method of abortion is within the power of the state legislature as being "reasonably related" to the protection of maternal health.

The record of trial discloses that use of the saline method exposes a woman to the danger of severe complications, regardless of the skill of the physician or the precaution taken. Saline may cause one or more of the following conditions: Disseminated intervascular coagulation or "consumptive coagulopathy" (disruption of the blood clotting mechanism [Dr. Warren, Tr. 57-58; Klaus, Tr. 269-270; Dr. Anderson, Tr. 307; Defts' Exs. H & M]), which may result in severe bleeding and possibly death

(Dr. Warren, Tr. 58); hypernatremia (increase in blood sodium level), which may lead to convulsions and death (Dr. Klaus, Tr. 268); and water intoxication (accumulated water in the body tissue which may occur when oxytoxin is used in conjunction with the injection of saline), resulting in damage to the central nervous system or death (Dr. Warren, Tr. 76; Dr. Klaus, Tr. 270-271; Dr. Anderson, Tr. 310; Defts' Ex. L). There is also evidence that saline amniocentesis causes massive tissue destruction to the inside of the uterus (Dr. Anderson, Tr. 308).

Still, as plaintiffs have pointed out, the fact that saline presents a serious threat to the health of a woman undergoing this technique of abortion is not determinative of the issue. Every known medical procedure involves a certain degree of risk to the patient. The reason given by the Supreme Court in holding that a state may not regulate the abortion procedure on the basis of the mother's health until the end of the first trimester was "because of the now-established medical fact • • • that until the end of the first trimester mortality in abortion may be *less* than mortality in normal childbirth." (Emphasis added.) *Roe* v. *Wade,* supra, at page 163.

Testimony at trial established that the mortality rate in childbirth is approximately twenty per one hundred thousand (Dr. Warren, Tr. 44, Dr. Kerenyi, Tr. 94); mortality with saline is approximately fifteen per one hundred thousand (estimates range from twelve to twenty-five per one hundred thousand; Dr. Warren, Tr. 43-44; Dr. Kerenyi, Tr. 89; Dr. Anderson, T. 329-330). Therefore, the validity of the Missouri legislature's refusal to permit use of the saline method after the twelfth week of pregnancy must turn on the availability of safe alternative methods of inducing abortions.

Alternative procedures for inducing midtrimester abor-

tion include surgery (hysterotomy and hysterectomy), injection of drugs either intramniotically or extraovulary, and mechanical stimulation. The most significant of these methods is the intraamniotic injection of prostaglandin. Dr. Anderson, Chief of Obstetrics at Yale University, testified that he knew of no known deaths associated with prostaglandins as of the date of trial (Tr. 323). Only Dr. Kerenyi would not say that prostaglandin is safer than saline amniocentesis (Tr. 93). All of the other medical witnesses, including both of the individual plaintiff-physicians, agreed that prostaglandin was safer (Dr. Warren, Tr. 56; Dr. Klaus, Tr. 274; Dr. Anderson, Tr. 327-328; Dr. Freiman, Tr. 368; Dr. Hall, Tr. 369-370).

Dr. Freiman stated in his deposition, portions of which were introduced into evidence at trial, that "the risk of prostaglandin is thought to be even less than the risk of saline amniocentesis" (Tr. 368). Similarly, Dr. Hall admitted that prostaglandin was developed in order to avoid the complications inherent with the use of saline (Tr. 369-370). Dr. Anderson's endorsement of prostaglandin was so strong that he suggested physicians should be liable for malpractice if they chose saline over prostaglandin after having been given all the facts on borth methods (Tr. 336). It appears that prostaglandins has only been in use for about five years, compared with over ten years of experience with saline (Dr. Kerenyi, Tr. 94). However, the use of all abortion procedures was extremely limited until passage of the abortion reform law in the State of New York four years ago, (Dr. Kerenyi, Tr. 94).

Nor is prostaglandin the exclusive alternative to saline amniocentesis. The mechanical means of inducing abortion are also less dangerous (Dr. Klaus, Tr. 274).

Testimony as to the legislative history of House Bill 1211 disclosed that the Missouri General Assembly based

its conclusion as to the dangers of saline on extensive medical evidence. Representative O'Toole, one of the sponsors of the bill, testified that numerous medical publications on abortion procedures were made available to the legislature, including defendants' Exhibits W, Y, Z, AA, M, BB, CC, DD, J and K (Tr. 186-191), and that there was extended discussion in both the House and Senate as to the relative merits of the various procedures (Tr. 182-183). The conclusion of the Missouri General Assembly is adequately supported by the record. The proscription against use of saline amniocentesis is reasonably related to maternal health and is, therefore, within the power of the legislature.

Sections 10 and 11: Sections 10 and 11 pertain to the maintenance of abortion records. The acquisition of data is essential to the advancement of medical knowledge. These provisions establish reporting procedures for statistical purposes only, and require that the division of health ensure the confidentiality of all information. Nothing in these sections would serve to restrict either the abortion decision itself or the exercise of medical judgment in performing an abortion.

This memorandum opinion is adopted by the Court as its findings of fact and conclusions of law, and the clerk of the court will prepare and enter the proper judgment to the effect that Sections 2(2), 3(2), 3(3), 3(4), 7, 9, 10 and 11 of House Bill 1211 are constitutional, and that Section 6(1) of House Bill 1211 is unconstitutional and defendants are enjoined from enforcing Section 6(1) of House Bill 1211.

/s/ Roy W. Harper
U. S. Senior District Judge

/s/ H. Kenneth Wanglin
U. S. District Judge

WEBSTER, Circuit Judge, concurring in part and dissenting in part.

I concur in the majority opinion upholding the constitutional validity of Section 2(2)[1] (defining "vi'ability"), Section 3(2) (requiring the woman's written consent to an abortion), Section 10 (maintenance of records) and Section 11 (retention of records). I concur in the majority opinion holding that Section 6(1) (standard of care) is unconstitutionally overbroad. I dissent from the majority opinion upholding the constitutionality of Section 3(3) (requiring spousal consent), Section 3(4) (requiring parental consent where the woman is unmarried and under the age of 18 years), Section 7 (terminating parental rights if child is born alive) and Section 9 (prohibiting use of the saline amniocentesis method of abortion).

Pregnant Woman's Consent

I join in the views expressed by the majority upholding Section 3(2), anr I add one further reason in support of its validity. The state has been told it may have no part in the abortion decision during the first trimester—that this is a decision to be left to the medical judgment of the pregnant woman's attending physician "in consultation with his patient." *Roe v. Wade,* 410 U.S. 113, 163 (1973). The requirement of Section 3(2) that a woman evidence her consent in writing is not burdensome or chilling, but instead manifests a legitimate interest of the state that this important decision has in fact been made by the person constitutionally empowered to do so. The evidence at trial supports the conclusion that, as presently practiced, the abortion decision may not always be made in the one-on-one deliberative manner contemplated by the Supreme Court.[2] Professor Tribe has interpreted *Roe* not as a precedent in favor of abortion over continued pregnancy but

instead as "a decision about *who should make judgments of that sort.*" Tribe, *Foreword: Toward a Model of Roles in the Due Process of Life and Law,* 87 Harv. L. Rev. 1, 11 (1973). The requirement of written consent, as framed by Section 3(2), reinforces the locus of that authority and in no way interproses the state or third parties in the decision-making process. Any regulations adopted pursuant thereto will of course be subject to judicial scrutiny, but only the statute is before us at this time.

Spousal Consent

Section 3(3) requires the consent of the spouse of a married woman seeking an abortion prior to the end of the first 12 weeks of pregnancy. Strong as is the state's interest in protecting the "regularity and integrity of the marriage relation," I cannot agree that such interest permits the state to delegate to a spouse a veto power which the state itself is absolutely and totally prohibited from exercising during the first trimester of pregnancy.

In *Roe v. Wade, supra,* the Supreme Court recognized that after the first trimester of pregnancy "a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health." 410 U.S. at 163. In the very next breath, however, it said:

> This means, on the other hand, that, for the period of pregnancy prior to this 'compelling' point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State.

In contrast to the requirement of Section 3(2) that the woman manifest her own consent in writing, which imposes no restriction on the decision-making process, Section 3(3) places an impermissible condition upon the fundamental right of a woman to elect an abortion during the first trimester, and it thus runs afoul of the *Roe* mandate against interference, quoted *supra*. Research has disclosed no other court which has held otherwise. *See Coe v. Gerstein*, 376 F. Supp. 695 (S.D. Fla. 1973), *appeal dismissed, cert. denied per curiam*, 417 U.S. 279 (1974); *Doe v. Rampton*, 366 F. Supp. 189 (D. Utah 1973); *Doe v. Doe*, —Mass.—, 314 N.E.2d 128 (1974); *Jones v. Smith*, 278 So.2d 339 (Fla.Ct.App. 1973), *cert. denied*, 415 U.S. 958 (1974).

The marital union is not exalted above the individual in the constitutional scheme. As the Supreme Court said:

> [T]he marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.
>
> *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (emphasis in original).

In *Roe v. Wade, supra*, the Supreme Court expressly declined to consider the collateral rights of a spouse which might flow from a woman's decision to have an abortion during the first trimester.[3] 410 U.S. at 165 n.67. I see no need to speculate upon such rights in this case. It is clear to me that whatever his civil claims against the doctor, the hospital or even his wife, the state may not regulate to protect the interests of the husband if it interferes in any significant way with the woman's right to have the abortion. Section 3(3) can have no other effect.[4]

Parental Consent

Section 3(4) is constitutionally infirm for the same reasons as is Section 3(3), but additional comment is required. It is suggested that the Supreme Court did not intend to emancipate females under the age of 18 and also that *Roe* and *Doe* should not be read so as to permit minor children to be alienated from proper parental supervision. The short constitutional answer is that the Fourteenth Amendment does not differentiate between adults and minors, and such distinctions have been repeatedly rejected. *See In re Gault,* 387 U.S. 1, 13 (1967). *See also In re Winship,* 397 U.S. 358 (1970); *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503 (1968).

But this is not the whole answer, for the Supreme Court has held that even where constitutional rights are at stake, a state may impose more stringent regulations on the activities of children than it may adopt with respect to adults. *Ginsberg v. New York,* 390 U.S. 629 (1968); *Prince v. Massachusetts,* 321 U.S. 158 (1944). Yet, I do not suppose it could be seriously argued that a minor could be made to submit to an abortion at the insistence of her parents. *In re Smith,* 16 Md. App. 209, 295 A.2d 238 (1972). I cannot see why she would not be entitled to the same right of self-determination now explicitly accorded to adult women, provided she is sufficiently mature to understand the procedure and to make an intelligent assessment of her circumstances with the advice of her physician.[5] *See Ballard v. Anderson,* 4 Cal.3d 873, 484 P.2d 1345, 95 Cal. Rptr. 1 (1971) (en banc); Wasserman, *Implications of the Abortion Decisions: Post Roe and Doe Litigation and Legislation,* 74 Colum. L. Rev. 237, 245-247 (1974); Pilpel and Zuckerman, *Abortion and the Rights of Minors,* 23 Case W. Res. L. Rev. 779 (1972); *cf. Coe v. Gerstein, supra; Doe v. Rampton, supra.* The challenged section does not make this

distinction and is thus, in my opinion, unconstitutionally overbroad in that it could interfere with protected rights within the first trimester of pregnancy of one physically and mentally competent to exercise those rights.[6]

Termination of Parental Rights

Section 7 makes an infant born alive following an attempted abortion which was not performed to save the life or health of the mother an abandoned ward of the state under the jurisdiction of the juvenile court wherein the abortion occurred * * *." It further provides that a parent who consented to such abortion "shall have no parental rights or obligations whatsoever relating to such infant, as if the parental rights had been terminated pursuant to Section 211.411 [*sic*], RSMo."

This section in my view contains an incurable constitutional flaw: it is totally lacking in procedural due process. The majority opinion views this section as a compassionate effort on the part of the state to make sure that an unwanted child is never for a moment without protection, and it *assumes* that parents will be accorded the same hearing rights as are found in Section 211.441, RSMo, which provides a statutory plan for terminating parental rights in other circumstances. I respectfully disagree.

First, the statutory language rebuts any inference of an intended hearing. It states that as to such live born infant the parent who consented to the abortion "shall have no parental rights or obligations *whatsoever, as if* the parental rights *had been* terminated pursuant to Section 211.411 [*sic*], RSMo." (Emphasis added.) The only interpretation which I can give to such clause is that parental rights are to be terminated upon the birth of the child as if all of the statutory procedures for termination

of parental rights had already taken place. Significantly, Section 211.441, RSMo, does not make a child an abandoned ward of the state prior to hearing as does this Section 7. I do not understand the state to have argued for the construction placed upon Section 7 by the majority, and I cannot accept it. It seems to me abundantly clear that the state proposes to take a live born child away from its parents, if they consented to an abortion, because in the view of the state it was "unwanted," and for this reason alone the consenting parents have forfeited all rights to such child. This posture ignores entirely the range of alternatives available and assumes that because a mother may for a variety of reasons have decided upon an abortion she would with certainty abandon the child if it should be born alive, or, more invidiously, that she thereby became unworthy to keep the child. No state has the right to make this judgment on a per se basis. *See Stanley v. Illinois,* 405 U.S. 645 (1972). The chilling effect of such legislation is so obvious as to require no further discussion; it clearly and explicitly exceeds regulation "reasonably related to maternal health." *Roe v. Wade, supra,* 410 U.S. at 164.

The Saline Procedure

Section 9 presents in many respects the most difficult section for constitutional analysis. Clearly a state may act to prevent conduct which threatens the health of its citizens. We deal here, however, not with problems of contagion but with individual choices in medical techniques for the termination of pregnancy. After hearing considerable testimony, the Missouri Legislature determined that the technique known as saline amniocentesis was "deleterious to maternal health" and therefore prohibited its use after the first twelve weeks of pregnancy. The exclusion of the first twelve weeks is explained as avoidance of the regulation

during the first trimester of pregnancy as required by *Roe;* as a practical matter the saline process has not been used by physicians during the first trimester.

Judge Harper has summarized most of the significant medical testimony with respect to the saline procedure and available alternatives, as well as the mortality risks, counter-indications and side effects of each, and I need not repeat them here. The question, it seems to me, is whether the state has demonstrated a sufficiently compelling interest in maternal health to justify interfering, in a legislative way, with "the right of the physician to administer medical treatment according to his professional judgment," *Roe v. Wade,* 410 U.S. at 165, and whether in this instance, the legislation has been "*narrowly drawn* to express only the legitimate state interests at stake." *Roe v. Wade,* 410 U.S. at 155 (emphasis added).

It is conceded that prior to the enactment of this statute a statute mandating the application of a prophylactic solution to the eyes of newly born infants was the only known attempt by the Missouri Legislature to interfere with medical judgment in maternity cases.[7] Section 9 outlaws in Missouri a procedure now employed throughout the United States in approximately seventy-five per cent of all second and third trimester abortions. That fact alone should have given the legislature some pause. It is undisputed in the testimony in this case that the mortality rate from use of saline is less than in childbirth. It is also significantly safer than two alternative procedures—hysterotomy and hysterectomy—yet neither of these surgical procedures were proscribed.[8]

Saline has been in use for over ten years. The main thrust of the state's argument is that a newer process known as prostaglandin is safer than saline. That may well be, although the drug has only been available on a non-experi-

mental basis for slightly more than one year.[9] It is not now readily available. It too has counter-indications—for persons suffering from glaucoma and asthma. Dr. Anderson, one of the state's chief witnesses, and an ardent advocate of the prostaglandin method, refused to characterize the saline procedure as unsafe. It is thus not unfair to conclude that the only thing that Section 9 accomplishes is the proscription of a procedure now utilized by physicians in seventy-five per cent of all second and third trimester abortions even though less safe methods are still permitted and the legislatively favored method of prostaglandin is not readily available. I cannot agree that such regulation is reasonably related to maternal health; to the contrary, this seems to be the kind of unwarranted intrusion in medical discretion which the Supreme Court has held infringes upon the patient's constitutional rights.[10] *See Word v. Poelker*, 495 F.2d 1349 (8th Cir. 1974).[11]

/s/ William H. Webster
United States Circuit Judge

[1] All section references in this paragraph are to Missouri House Bill 1211, enacted into law June 14, 1974.

[2] Judith Widdicombe, Executive Director of Reproductive Health Services, Inc., a not-for-profit corporation, testified with respect to the customary procedure followed by the agency. The patient is first requested to see her own doctor and verify the fact of pregnancy and expected term. Thereafter, she is invited to come in for counseling. Reproductive Health Services has 87 associated counselors, including clergymen, nurses and psychologists. Various options are explained to the patient, including the possibility of adoption and medical and economic support sources during the period of pregnancy. If the patient elects to terminate pregnancy and fulfills certain guidelines, a doctor is chosen from a scheduling roster. The doctor performs an average of 8 abortions in a 3½ hour session. After the abortion the patient is told to see her private physician. The agency makes a one-month and one-year post-termination follow-up for evaluation purposes. Consents were routinely required.

Planned Parenthood of Central Missouri utilizes a number of counselors, including social workers, none of whom are physicians. A physician sees the patient to determine whether or not she is pregnant. He apparently does not participate in the counseling process. All of the abortions are performed by the same doctor.

Dr. Thomas D. Kerenyi, Associate Professor and Director of the outpatient department of the Department of Obstetrics and Gynecology at Mount Sinai School of Medicine in New York City, testified that in the four years in which abortions have been permitted in New York, he has personally participated in between 4,000 and 5,000 abortions.

[3] The Supreme Judicial Court of Massachusetts made the distinction clear in this way:

> Nothing we say here is intended to affirm or deny a right in the husband to divorce, separation, child custody, or the like by reason of an abortion procured by his wife without his consent. We are deeply conscious of the husband's interest in the abortion decision, at least while the parties are living together in harmony. Surely, if the family life is to prosper, he should participate with his wife in the decision. But it does not follow that he must have an absolute veto, or that his veto, reasoned or unreasoned, can be enforced by the Commonwealth. *Doe v. Doe*, ——Mass.——, 314 N.E.2d 128, 133 1974).

[4] At trial, Dr. James C. Warren, Chairman of the Department of Obstetrics and Gynecology at Washington University School of Medicine and a member of the staff of Barnes Hospital, testified that since June 15, 1974, he had received requests for abortions from married women, some of whom could not obtain spousal consent and some of whom would not obtain spousal consent; all of the women who did not obtain such consent were refused abortions because of Section 3(3). Judith Widdicombe, Executive Director of Reproductive Health Services, Inc., testified that from June 15, 1974, through July 22, 1974, as a direct result of Section 3(3), her organization had refused abortion services to 22 women who would not obtain spousal consent and to 38 women who could not obtain such consent.

[5] In Missouri, the right of a person under the age of twenty-one to give legal consent to examination, treatment, hospitalization, medical and surgical care for pregnancy, venereal disease and drug or substance abuse is expresaly recognized. RSMo § 431.063; *see* RSMo § 431.062.

[6] An additional reason for rejecting third party consents was expressed in *Wolfe v. Schroering*, Civil Action No. C-74-186-L(B) (W.D. Ky., Nov. 19, 1974):

> Further, as affects the interest of protecting maternal health, the broad provision as written gives power to the husband or parent to withhold consent without any reason, or without good or sufficient reason, and entirely unconnected with the pregnancy or the woman's health.
>
> (Slip opinion at 9-10.)

[7] RSMo § 210.070.

[8] Mortality figures for the surgical procedures indicate a death rate of approximately 200 per 100,000 compared with 15 per 100,000 using saline.

[9] Dr. Warren, Chairman of the Department of Obstetrics and Gynecology at Washington University School of Medicine, testifying for the plaintiffs, said that there is at the present time no reason to believe that the mortality rate with prostaglandin is less than that with saline. [Tr. 42.]

[10] It may be argued that the state's compelling interest in potential human life justifies the proscription of the use of saline, since this process is more likely than other processes to result in the death of the fetus. Thus a persuasive argument can be made that the power to proscribe abortions includes the power to prohibit a means of abortion deemed most lethal to the fetus. We cannot reach this argument here, however; first, it has not been briefed or fully urged upon us, and second, it could only apply in the period following viability, *Roe v. Wade, supra*, 410 U.S. at 163, whereas Section 9 applies both to the second and third trimesters. If in the course of time prostaglandin proves to be a safer, more efficacious and more readily available medical procedure than saline, I have no doubt that it will become the procedure predominately in use in second and third trimester abortions. But this process should take place in the customary way, through research and experience, and not under criminal sanctions imposed by a single legislature. The mother is likewise protected against an individual practitioner "who abuses the privilege of exercising proper medical judgment [by] the usual remedies, judicial and interprofessional * * *." *Roe v. Wade, supra*, 410 U.S. at 166.

[11] Noting that there were no physicians in Kentucky competent in the technique of prostaglandin amnio infusion, that there were neither centers nor doctors in the area licensed to perform the procedure and that an effective and safe method of abortion should be generally available, a three-judge court in Kentucky held a similar section invalid. *Wolfe v. Schroering*, Civil Action No. C-74-186-L(B) (W.D. Ky., Nov. 19, 1974).

IN THE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

PLANNED PARENTHOOD OF CENTRAL MISSOURI, a Missouri corporation, DAVID HALL, M.D., and MICHAEL FREIMAN, M.D., *Plaintiffs,* vs. JOHN C. DANFORTH, Attorney General of the State of Missouri, and J. BRENDAN RYAN, Circuit Attorney of the City of St. Louis, Missouri. *Defendants.*	No. 74-416C (A)

ORDER, JUDGMENT AND DECREE

In accordance with the Memorandum Opinion of the Court this day filed declaring Sections 2(2), 3(2), 3(3), 3(4), 7, 9, 10 and 11 of House Bill No. 1211 passed by the Missouri General Assembly on April 30, 1974, and signed into law on June 13, 1974, (hereinafter referred to as House Bill 1211), to be constitutional, and Section 6(1) of House Bill 1211 to be unconstitutional (Circuit Judge William H. Webster concurring in part and disseting in part):

It is hereby ORDERED, ADJUDGED and DECREED as follows:

1. That, with respect to Sections 2(2), 3(2), 3(3), 3(4), 7, 9, 10 and 11 of House Bill 1211, judgment be and hereby is entered in favor of defendants and against plaintiffs,

and this cause as to said Sections of House Bill 1211 is dismissed with prejudice; and

2. That, with respect to Section 6(1) of House Bill 1211, judgment be and hereby is entered in favor of plaintiffs and against defendants, said Section being held to be unconstitutional and its enforcement enjoined.

WILLIAM D. RUND
William D. Rund, Clerk
U.S. District Court

The foregoing Order, Judgment and Decree is hereby approved as to form and entered by direction of the Court this 31st day of January, 1975.

/s/ ROY W. HARPER
U.S. Senior District Judge

/s/ H. KENNETH WANGELIN
U.S. District Judge

/s/ WILLIAM H. WEBSTER
U.S. Circuit Judge

IN THE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

PLANNED PARENTHOOD OF CENTRAL MISSOURI, a Missouri corporation, DAVID HALL, M.D., and MICHAEL FREIMAN, M.D., *Plaintiffs,* vs. JOHN C. DANFORTH, Attorney General of the State of Missouri, and J. BRENDAN RYAN, Circuit Attorney of the City of St. Louis, Missouri. *Defendants.*	No. 74-416C (A)

DEFENDANT JOHN C. DANFORTH'S MOTION TO ALTER OR AMEND JUDGMENT

John C. Danforth, Attorney General of the State of Missouri, one of the named defendants herein, hereby moves this Court pursuant to Rule 59(e), Federal Rules of Civil Procedure, to amend the last paragraph of its Order, Judgment and Decree entered herein on January 31, 1975, by *deleting* the second numbered paragraph thereof and by *substituting* therefor the following:

> "2. That, with respect to Section 6(1) of House Bill 1211, judgment be and hereby is entered in favor of plaintiffs and against defendants with respect to the first sentence thereof said sentence being held to be unconstittuional and its enforcement enjoined and judgment be and hereby is entered in favor of de-

fendants and against plaintiffs with respect to the balance of Section 6(1) and this cause as to the balance of Section 6(1) is dismissed with prejudice."

WHEREFORE, Defendant John C. Danforth, Attorney General of Missouri prays the Order of this Court amending or altering its Order, Judgment and Decree entered herein on January 31, 1975, in the manner stated above.

/s/ JOHN C. DANFORTH
Attorney General

/s/ D. BROOK BARTLETT
First Assistant Attorney General

/s/ KAREN M. IVERSON
Assistant Attorney General

Supreme Court Building
Jefferson City, Missouri 65101
314, 751-3321

Attorneys for Defendant
John C. Danforth

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing was mailed by United States mail, postage prepaid, on this 6th day of February, 1975, to:

Frank Susman, Esq.
Suite 1100
7733 Forsyth Boulevard
St. Louis, Missouri 63105

Mr. J. Brendan Ryan
Circuit Attorney of the City of St. Louis
Municipal Court Building
1320 Market Street
St. Louis, Missouri 63103

/s/ D. Brook Bartlett

IN THE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

PLANNED PARENTHOOD OF CENTRAL MISSOURI, a Missouri corporation, DAVID HALL, M.D., and MICHAEL FREIMAN, M.D., *Plaintiffs,* vs. JOHN C. DANFORTH, Attorney General of the State of Missouri, and J. BRENDAN RYAN, Circuit Attorney of the City of St. Louis, Missouri. *Defendants.*	**No. 74-416C (A)**

ORDER

Motion of defendant, John C. Danforth, to alter or amend judgment, OVERRULED IN ALL PARTICULARS.

/s/ WILLIAM H. WEBSTER
Circuit Judge

/s/ H. KENNETH WANGELIN
District Judge

/s/ ROY W. HARPER
Senior District Judge

(Filed February 12, 1975)

IN THE
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

PLANNED PARENTHOOD OF CENTRAL MISSOURI, a Missouri corporation, DAVID HALL, M.D., and MICHAEL FREIMAN, M.D., *Plaintiffs-Appellants,* vs. JOHN C. DANFORTH, Attorney General of the State of Missouri, and J. BRENDAN RYAN, Circuit Attorney of the City of St. Louis, Missouri. *Defendants-Appellees.*	No. 74-416C (A)

NOTICE OF APPEAL

Notice is hereby given that Defendant John C. Danforth, Attorney General of the State of Missouri, hereby appeals to the United States Supreme Court that part of this Court's Order, Judgment and Decree entered on the 31st day of January, 1975, which holds that Section 6 of Missouri House Bill No. 1211 is unconstitutional and enjoining enforcement thereof; furthermore, Defendant John C. Danforth appeals from this Court's denial on February 12, 1975, of his Motion to Alter or Amend Judgment.

This appeal is taken pursuant to 28 U.S.C. Section 1253.

/s/ JOHN C. DANFORTH
Attorney General

/s/ D. BROOK BARTLETT
First Assistant Attorney General

/s/ KAREN M. IVERSON
Assistant Attorney General

(Filed March 14, 1975)

STATE OF MISSOURI)
) ss.
COUNTY OF COLE)

Affidavit of Service

D. Brook Bartlett, being of lawful age and duly sworn states: a) that he is a member of the Bar of the State of Missouri, is the First Assistant Attorney General of the State of Missouri and as such is one of the attorneys representing Defendant-Appellee John C. Danforth, Attorney General of Missouri, in this action; and b) that pursuant to Supreme Court Rule 33, he has caused to be served a true and correct copy of the foregoing "Notice of Appeal" upon each party required to be so served, by depositing said copy in a United States Postal Service mail box, with first-class postage prepaid and affixed, addressed to Frank Susman, Esq., Suite 1100, 7733 Forsyth Boulevard, St. Louis, Missouri 63105, Attorney for Plaintiffs-Appellants, and Mr. J. Brendan Ryan, Circuit Attorney of the City of St. Louis, Municipal Court Building, 1320 Market Street, St. Louis, Missouri 63103, Defendant-Appellee, all this 13th day of March, 1975.

/s/ D. Brook Bartlett

Subscribed and sworn to before me this 13th day of March, 1975.

/s/ LaVerla R. Kistler
Notary Public

My commission expires July 31, 1977.

This Act performed in the County of Cole, Mo., which adjoins the County of Moniteau, Mo., for which I am Commissioned.

CERTIFICATE OF SERVICE

I, the undersigned appellant and a member of the Bar of the United States Supreme Court, do hereby certify that pursuant to Supreme Court Rule 33 I have caused to be served true and correct copies of the foregoing *Jurisdictional Statement* upon each party required to be so served by depositing said copies in a United States post office or mail box, with first-class postage prepaid, addressed to Frank Susman, Esq., 7733 Forsyth Boulevard, Suite 1100, St. Louis, Missouri 63105, and Judith Mears, Esq., 22 East 40th Street, New York City, New York 10016, Attorneys for Appellees Planned Parenthood of Central Missouri, et al., and to the Honorable J. Brendan Ryan, Circuit Attorney of the City of St. Louis, Municipal Court Building, 1320 Market Street, St. Louis, Missouri 63103.

JOHN C. DANFORTH
Attorney General of Missouri

Supreme Court Building
Jefferson City, Missouri 65101
314, 751-3321

Appellant

MAY 29 1975

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1419

JOHN C. DANFORTH, Attorney General
of the State of Missouri,
Appellant,

vs.

PLANNED PARENTHOOD OF CENTRAL MISSOURI, a Missouri Corporation, DAVID HALL, M.D., MICHAEL FREIMAN, M.D., and J. BRENDAN RYAN, Circuit Attorney of the City of St. Louis, Missouri,
Appellees.

On Appeal from the United States District Court for the Eastern District of Missouri, Eastern Division

MOTION OF APPELLEES, PLANNED PARENTHOOD OF CENTRAL MISSOURI, DAVID HALL, M.D., AND MICHAEL FREIMAN, M.D., TO AFFIRM THE JUDGMENT SOUGHT TO BE REVIEWED AND BRIEF OF SAID APPELLEES IN SUPPORT THEREOF

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1419

JOHN C. DANFORTH, Attorney General
of the State of Missouri,
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vs.

PLANNED PARENTHOOD OF CENTRAL MISSOURI, a Missouri Corporation, DAVID HALL, M.D., MICHAEL FREIMAN, M.D., and J. BRENDAN RYAN, Circuit Attorney of the City of St. Louis, Missouri,
Appellees.

On Appeal from the United States District Court for the
Eastern District of Missouri, Eastern Division

MOTION OF APPELLEES, PLANNED PARENTHOOD OF CENTRAL MISSOURI, DAVID HALL, M.D., AND MICHAEL FREIMAN, M.D., TO AFFIRM THE JUDGMENT SOUGHT TO BE REVIEWED

Come now said appellees and pursuant to Rule No. 16(1)(c) of the United States Supreme Court move this Honorable Court to affirm the "Order, Judgment and Decree" of January 31, 1975, and to affirm the "Order" of February 12, 1975, both

as unanimously rendered by the United States District Court for the Eastern District of Missouri, Eastern Division, in Cause No. 74-416(C)(A), encaptioned *Planned Parenthood of Central Missouri*, et al. v. *Danforth*, etc., et al., The Honorable William H. Webster, United States Circuit Judge, The Honorable Roy W. Harper, United States Senior District Judge, and The Honorable H. Kenneth Wangelin, United States District Judge, presiding, in and only so far as said "Order, Judgment and Decree" and said "Order" declare unconstitutional Section 6(1) of "House Committee Substitute for House Bill No. 1211", enacted into law and effective in the State of Missouri on June 14, 1974.

Said appellees so move to affirm on the ground that it is manifest that the questions raised by appellant Danforth and on which the decision of this cause depends, are so unsubstantial as neither to need nor to warrant further argument and judicial review by this Honorable Court.

Said appellees further so move to affirm on the ground that for this Honorable Court to note probable jurisdiction or to postpone consideration of the question of jurisdiction would only seek to encourage the passage of legislation which flies in the face of this Honorable Court's decisions in *Roe*, et al. v. *Wade*, 410 U.S. 113 (1973) and *Doe*, et al. v. *Bolton*, et al., 410 U.S. 179 (1973) and which on each and every occasion challenged have been declared unconstitutional or have been stayed on appeal. The listing of all such cases to date is too numerous to cite herein.

WHEREFORE, said appellees pray this Honorable Court to affirm said "Order, Judgment and Decree" and said "Order", as they apply to said Section 6(1), herein appealed.

Respectfully submitted

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1419

JOHN C. DANFORTH, Attorney General
of the State of Missouri,
Appellant,

vs.

PLANNED PARENTHOOD OF CENTRAL MISSOURI, a Missouri Corporation, DAVID HALL, M.D., MICHAEL FREIMAN, M.D., and J. BRENDAN RYAN, Circuit Attorney of the City of St. Louis, Missouri,
Appellees.

On Appeal from the United States District Court for the Eastern District of Missouri, Eastern Division

BRIEF OF APPELLEES, PLANNED PARENTHOOD OF CENTRAL MISSOURI, DAVID HALL, M.D., AND MICHAEL FREIMAN, M.D., IN SUPPORT OF THEIR MOTION TO AFFIRM THE JUDGMENT SOUGHT TO BE REVIEWED

Introduction

Appellees, for the sake of brevity and the avoidance of unnecessary repetition, adopt by reference the sections of appel-

lant Danforth's *Jurisdictional Statement* entitled "Jurisdictional Statement" (Jur.St. p. 1), "Citation to Opinion Below" (Jur. St. p. 2), "Jurisdiction" (Jur.St. pp. 2-4) and "Appendix" (Jur. St. pp. 13-52). Nevertheless, appellees do feel compelled to note to this Honorable Court the conspicuous failure of appellant Danforth to recite this Honorable Court's granting of a stay and injunction as to all portions of the challenged legislation held constitutional by the District Court. (43 L.Ed.2d 389, No. A-656, Feb. 18, 1975).

Appellees shall respond to the "Questions Presented" (Jur. St. p. 4) as posed by appellant Danforth and shall demonstrate their unsubstantial nature, thus obviating the necessity and the desirability for further argument of the same before this Honorable Court.

I

The District Court Acted Properly and Correctly in Deciding the Constitutionality of Section 6(1) of the Challenged Legislation and the Doctrine of Abstention Was Inapplicable to the Situation Before the District Court

The doctrine of abstention has been defined and explained by this Honorable Court as follows,

> "The paradigm of the 'special circumstances' that make abstention appropriate is a case where the challenged state statute is susceptible of a construction by the state judiciary that would avoid or modify the necessity of reaching a federal constitutional question. * * * Abstention in such circumstances not only serves to minimize federal-state friction, but also avoids premature and perhaps unnecessary constitutional adjudication. Harman v. Forssenius, 380 US 528, 534, 14 L Ed 2d 50, 85 S Ct 1177. But the doctrine of abstention 'contemplates that deference to state court adjudication only be made where the issue of

> state law is uncertain.' Ibid. Where, on the other hand, it cannot be fairly concluded that the underlying state statute is susceptible of an interpretation that might avoid the necessity for constitutional adjudication, abstention would amount to shirking the solemn responsibility of the federal courts to 'guard, enforce, and protect every right granted or secured by the Constitution of the United States.' Robb v. Connolly, 111 US 624, 637, 28 L Ed 542, 4 S Ct. 544." (*Kusper*, et al. v. *Pontikes*, 414 U.S. 51, 54-55 [1973]).

(See, also, *Zwickler* v. *Koota*, 389 U.S. 241, 248-249 [1967] and *Harrison*, et al. v. *National Association for the Advancement of Colored People*, et al., 360 U.S. 167, 176-178 [1959]).

Of the five federal court cases involving the interpretation of restrictive abortion legislation and regulation in Missouri, the Federal District Court has abstained on two prior occasions and was each time reversed. (*Rodgers* et al. v. *Danforth*, et al., 410 U.S. 949 [1973], and *Word*, et al. v. *Poelker*, et al., 495 F.2d 1349 [8th Cir. 1974]).

Abstention under the present circumstances is highly unwarranted, particularly when it is sought to be applied on a selective basis to only one section among a total of nine sections challenged. Furthermore, as will become evidence *infra*, the challenged wording is clearly not susceptible to an interpretation that would avoid constitutional infirmities. The District Court panel of three federal judges unanimously agreed on the patent meaning and intent of such Section 6(1).

II

The District Court Correctly and Properly Held Section 6(1) to Be Constitutionally Overbroad

It cannot be reasonably argued that the first sentence of Section 6(1) is intended only to apply post-natally. The use of the

word "fetus" in the first sentence and the use of the word "child" in the second and third sentences clearly intended to differentiate the time period involved. The failure of the challenged section to exclude from its coverage the early portions of pregnancy conflicts with the teachings of this Honorable Court in *Roe*, et al. v. *Wade*, 410 U.S. 113 (1973), and *Doe*, et al. v. *Bolton*, et al., 410 U.S. 179 (1973).

As this Honorable Court has stated,

> "Where fundamental personal rights are involved—as is true when as here the Government gets large access to one's beliefs, ideas, politics, religion, cultural concerns, and the like—the Act should be 'narrowly drawn' . . . to meet the precise evil." (*The California Bankers Association* v. *Schultz*, etc., et al., 416 U.S. 21, 85-86 [1974]). (See, also, *Roe*, *supra*, at p. 155).

The language of Section 6(1) literally runs counter to the entire remainder of the statute challenged herein and to the explicit directives of *Roe*, *supra*, and *Doe*, *supra*. It is impossible to abort a fetus while exercising the same "skill, care and diligence" used "to preserve the life and health of any fetus intended to be born". This vague, ill-defined and self-contradictory clause has a present and continuing "chilling effect" upon appellees and other similarly situated. Its meaning applies across the board to all stages of pregnancy and for this reason alone, among others, it is constitutionally defective. (For failure of regulation to distinguish between stages of pregnancy, see *Doe* v. *Rampton*, et al., *infra*, *Coe*, et al. v. *Gerstein*, etc., et al., 376 F.Supp. 695 [S.D.Fla. 1973], and *Word*, et al.v. *Poelker*, etc., et al., 495 F.2d 1349 [8th Cir. 1974]).

In *Hodgson*, et al. v. *Anderson*, etc., et al., 378 F.Supp. 1008 (D. Minn. 1974), the unanimous court held invalid a like clause requiring abortions to be performed when the fetus is "*potentially* viable" "under circumstances which will reasonably assure

the live birth and survival of the fetus" (Section 2, subdivision 3[3] of S.F. 498 [Minn. Stat., Section 145.412, Subd. 3(3) (1974)]).

An unanimous court in *Doe* v. *Rampton*, et al., 366 F.Supp. 189 (D. Utah 1973), voided sections of the law providing,

> "Medical procedure where fetus sufficiently developed.—If an abortion is performed when the fetus is sufficiently developed to have any reasonable possibility of survival outside its mother's womb, the medical procedure used must be that procedure which in the medical judgment of the physician will give such fetus the best chance of survival, and no medical procedure designed to kill or injure such fetus may be used." (Utah Stat. Ann., Section 76-7-309).
>
> "Medical skills to preserve life of fetus.—The physician performing any abortion must use all of his medical skills to promote, preserve and maintain the life of any fetus sufficiently developed to have any reasonable possibility of survival outside its mother's womb." Utah Stat. Ann., Section 76-7-310).

The court stated,

> "Sections 76-7-309 and 76-7-310 are invalid because they might apply in any trimester, and because, regardless of the trimester in which they are applied, they unduly interfere with the professional judgment of the doctor involved." (366 F.Supp. at p. 193).

At the trial of the present cause, appellees' witnesses, Dr. Warren (Tr. p. 29), Dr. Thomas Kerenyi (Tr. p. 91), and appellant's only witness personally familiar with the performance of abortions, Dr. Anderson (Tr. p. 345), all testified that it is medically impossible to perform an abortion while si-

multaneously complying with the requirements of this Section 6(1).

A fair and literal reading of this Section reveals the intent that the first sentence which utilizes the word "fetus", repeatedly and exclusively, and which contains no specific punishment reference applies only to the intra-utero period.

Similarly, the second sentence which utilizes the word "child", repeatedly and exclusively, and which contains a specific punishment of manslaughter, applies only to the extra-utero period. Violation by a physician of the first sentence of this Section is punishable by Sections 12 and 14 of the challenged legislation providing for revocation of medical license and conviction of a misdemeanor. The testimony of all witnesses indicated that all methods of abortion by definition and design are intended to produce the death of the fetus. Accordingly, the direct conflict between the first sentence of this Section and a woman's right to terminate a pregnancy is manifest.

In a related, recent case a federal three-judge panel enjoined an attempt by the Pennsylvania legislature to redefine viability in a manner imposing unwarranted and unconstitutional pre-natal burdens upon physicians. (*Planned Parenthood Association, Inc.*, et al. v. *Fitzpatrick*, et al. [E.D. Pa., No. 74-2440, filed and temporary injunction issued Sept. 20, 1974], *application for vacation of preliminary injunction denied*, sub nom. *Wohlgemuth*, et al. v. *Planned Parenthood of Southeastern Pennsylvania, Inc.*, et al., 42 L.Ed. 2d 797 [No. A-285, Jan. 13, 1975]).

Lastly, to adopt appellant's interpretation of Section 6(1) would create conflict and inconsistency as to the definition of the crime and its punishment with the pre-existing criminal, statutory scheme dealing with murder in the first degree (Mo.

R.S., Sections 559.010 and 559.030), murder in the second degree (Mo.R.S., Sections 559.020 and 559.030), manslaughter (Mo.R.S., Sections 559.070 and 559.140) and killing of an unborn quick child (Mo.R.S., Section 559.090).

III

The District Court Correctly and Properly Held the Entire Section 6(1) to Be Unconstitutional and the Various Sentences Thereof to Be Not Severable

The District Court correctly held both in its "Order, Judgment and Decree" of January 31, 1975, and its "Order" of February 12, 1975, that the three sentences comprising the challenged Section 6(1) were not severable one from the other.

The second sentence of Section 6(1) is inextricably tied in with the first sentence, inasmuch as it refers to *"the abortion"* and *"the child"*, an obvious reference to the preceding sentence. If this were not the case, the language utilized would undoubtedly be framed as *"an abortion"* and *"a child"*.

As stated in 16 *Am.Jur.* 2d, "Constitutional Law," Section 186, pp. 414-415,

> "If, however, the constitutional and the unconstitutional portions are so dependent on each other as to warrant the belief that the legislature intended them to take effect in their entirety, it follows that if the whole cannot be carried into effect, it will be presumed that the legislature would not have passed the residue independently, and accordingly, the entire statute is invalid." . . .
>
> "[I]f the purpose of a statute is to accomplish a single object only and some of its provisions are unconstitutional and void, the whole must fail, unless sufficient remains to effect the object without the aid of the invalid portions."

The challenged Section 6(1) has the singular purpose of attempting to set forth a comprehensive standard of care prescribed for physicians during an abortion, both pre-natally and post-natally. The Missouri legislature desired to enact an encompassing standard of care. It is beyond the area of concern as to whether the Missouri legislature would have enacted the remainder of Section 6(1) without the initial and primal sentence compromising approximately one-half (½) of the entire Section. They chose not to do so.

As cited with approval in *State* ex rel. *State Board of Mediation* v. *Pigg*, 244 S.W.2d 75 (Mo. 1951), at pp. 84-85,

> "The rule is stated in State ex rel. Transport Mfg. & Equipment Co. v. Bates, 359 Mo. 1002, 224 S.W.2d 996, 1001, as follows: 'It is generally true if the invalid provision of a statute and the residue thereof are wholly independent of each other, readily separable, and completely distinct; and if the residue is of itself complete, sensible and capable of being executed that the invalid provision will fall and the residue of the statute will stand. * * * The fact that the residue of an act remaining after a portion has been declared invalid may be complete in and of itself is not always sufficient to sustain it. If the invalid portion is so connected with the residue of the statute as to furnish the consideration for the enactment of the residue and as to warrant the belief that they were intended as a whole and that the Legislature would not have passed the part remaining had it known the other part would be held invalid, then the entire act must fall.' And see 50 Am. Jur. 354, Statutes, Sec. 353; 11 Am.Jur. 834, Const. Law, Secs. 152 and 155."

There can be little doubt that the various sentences of the challenged section were intended as a unified and interdependent whole.

CONCLUSION

For this Honorable Court to grant plenary review of an unanimous three-judge panel determination of the unconstitutionality of the challenged Section 6(1), which on its face directly conflicts with prior holding of this Honorable Court and an unanimous line of other federal court decisions or to grant plenary review as to the spurious issue of statutory severability is unwarranted. The issues attempted to be raised by appellant are so unsubstantial as not to need further argument nor judicial attention.

Respectfully submitted,

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Certificate of Service

I, the undersigned attorney for appellees, Planned Parenthood of Central Missouri, David Hall, M.D., and Michael Freiman, M.D., and a member of the bar of the United States Supreme Court, do hereby certify that pursuant to Supreme Court Rule No. 33 I have caused to be served true and correct copies of the foregoing "Motion of Appellees, Planned Parenthood of Central Missouri, David Hall, M.D., and Michael Freiman, M.D., to Affirm the Judment Sought to be Reviewed and Brief of Said Appellees in Support Thereof" upon each party required to be so served, by depositing said copies in a United States Postal Service mail box, with first class postage prepaid and affixed, addressed to The Honorable John C. Danforth, Attorney General of the State of Missouri, Supreme Court Building, Jefferson City, Missouri 65101 and to Mr. J. Brendan Ryan, Circuit Attorney of the City of St. Louis, 1320 Market Street, St. Louis, Missouri 63103.

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